Supreme Court, U.S.
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No. 96-471

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

CLARENCE MILLER, *et al.*,
Appellants,

v.

STATE OF OHIO, *et al.*,
Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

MOTION TO DISMISS OR TO AFFIRM

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Pursuant to Supreme Court Rule 18.6, Appellees Robert Taft, II, Secretary of State, George V. Voinovich, Governor of the State of Ohio, Stanley J. Aronoff, President of the Ohio Senate, Vernal G. Riffe, Jr., former Speaker of the Ohio House of Representatives, Ohio State Senator Eugene J. Watts, Ohio Representative William J. Healey, Ohio Senators Richard H. Finan, Robert J. Boggs, Alan Zaleski, former Ohio Senator Betty Montgomery, now retired Ohio Senator Barry Levey, Ohio Representative Robert Corbin, and former Ohio Representatives Judy B. Sheerer (current Ohio Senator), Michael P. Stinziano, and retired Ohio Representatives William L. Mallory and Corwin Nixon, all in their official capacities, and the State of Ohio (hereinafter referred to collectively as "Ohio") move to dismiss this appeal, or in the alternative, to affirm the judgment sought to be reviewed on the ground that the questions on which the decision on the cause depends are so unsubstantial as not to need further argument. The unpublished decision entered below is based on well-settled law established by this Court, and there is no conflict which requires this Court's resolution.

STATEMENT OF THE CASE

Ohio will not reiterate here the procedural history of this case or recite at length the allegations of Appellants' complaint in the district court, which are included in Appellants' jurisdictional statement.

Relevant Facts Relied Upon By Ohio In This Motion

This appeal involves a constitutional challenge to the congressional districting plan for Ohio which was enacted after the 1990 census. As a result of the 1990 census, Ohio lost two seats in the United States House of Representatives.

The Ohio congressional delegation accordingly decreased in size from twenty-one to nineteen. Complaint at ¶¶19 and 20, Appellants' Jurisdictional Statement (hereinafter "Jur. St.") at A-30. Thus, in accordance with longstanding historical practice, the Ohio General Assembly redistricted the state's congressional districts. According to Appellants' complaint, a ten-member bipartisan commission made up of then members of the Ohio House of Representatives and Ohio Senate drafted the redistricting plan. Complaint ¶26, Jur. St. at A-32. Ohio's Congressional Redistricting Plan is found at Ohio Revised Code ("O.R.C.") §3521.01 (effective March 27, 1992).

Appellants' complaint in the district court alleged that the redistricting plan resulted in nineteen districts, several of which had maximum population variances of +2 to -7 persons from exact numerical equality. Complaint at ¶28, Jur. St. at A-33.[1] Ohio submits that such a minute deviation from exact equality in population itself demonstrates Ohio's good faith in attempting to achieve equipopulous districts. Additionally, Appellants' complaint alleged legitimate

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[1]Appellants' 42-page complaint does not include the "ideal" district size, the number of Ohio districts which are exactly equal to that ideal, or the largest variation in terms of percent, even though these are the facts usually used by plaintiffs to buttress their claims of mathematical inequality. *Cf.* Jur. St. at 7, n.15. Nonetheless, it is possible to calculate the percentage of the maximum variation by using the one district size provided in Attachment 3 to the complaint. That attachment states that the size of new district 6 is 570,901. Jur. St. at A-63. Since Appellants also alleged that the greatest variation is nine people, all of the districts must be between 570,910 and 570,892 people in size. Nine divided by either of these numbers is less than 0.000016. Therefore, the maximum deviation of any district from the ideal district is at most 0.0016% according to the allegations of the complaint.

justifications for the variances, as recognized in established United States Supreme Court case law.

Appellants in this case are a former Republican Congressman, Clarence Miller, six unsuccessful Ohio Republican and Democratic candidates for Congress, including two persons who, according to the complaint, last ran for Congress in 1980 and 1984 respectively (Appellants Hollister and Grote), the Libertarian Party of Ohio, and an Ohio independent voter (Diana Kukor) whose district of residence is not alleged in the complaint. *See* Complaint at ¶¶1-9, Jur. St. at A-24, A-25. The complaint alleges that the Libertarian Party of Ohio is an organized, but not state-recognized, political party in Ohio. Complaint at ¶6, Jur. St. at A-25.[2] The complaint does not allege whether the small

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[2]A recognized political party in Ohio is "any group of voters meeting the requirements set forth in section 3517.01 of the [Ohio] Revised Code for formation and existence of a political party." O.R.C. §3501.01(F). In order to qualify as a political party under O.R.C. §3517.01, a group of voters must have:

> at the most recent regular state election, polled for its candidate for governor in the state or nominees for presidential electors at least five per cent of the entire vote cast for that office or that filed with the secretary of state, subsequent to any election in which it received less than five per cent of that vote, a petition signed by qualified electors equal in number to at least one per cent of the total vote for governor or nominees for presidential electors at the most recent election, declaring their intention of organizing a political party, the name of which shall be stated in the declaration, and of participating in the succeeding primary election, held in even-numbered years, that occurs more than one hundred twenty days after the date of

number of Ohioans who comprise the Libertarian Party reside in proximity to one another.

Appellants asserted in their complaint below that the new districting plan resulted from practices of both major political parties to enhance the re-election chances of incumbent congressional representatives of both parties (what Appellants termed "bipartisan gerrymandering"). One of the facts alleged by Appellants was that in 1992, Appellant Clarence Miller lost in the Republican primary (in Ohio's 6th congressional district) by a "razor-thin margin." *See* Complaint at ¶41, Jur. St. at A-37. As the district court correctly observed, rather than indicating that the congressional districts were so skewed that the General Assembly was able to pick the candidates for election, this allegation signifies that the people in fact had not been divested of their ability to choose their congressional representatives.

As these facts show, this appeal should be dismissed or the district court's judgment should be affirmed because the decision to dismiss the case was correct and in accordance with this Court's controlling precedents. Appellants' complaint failed to state a constitutional claim and, indeed, the allegations of the complaint *support* Ohio's position that the state's congressional districts are constitutionally valid. Thus, taking the facts alleged in Appellant's complaint to be true for the purposes of Ohio's

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> filing.... If any political party fails to cast five per cent of the total vote cast at an election for the office of governor or president, it shall cease to be a political party.

O.R.C. §3517.01(A).

motion to dismiss, the district court properly dismissed this case for failure to state a cognizable constitutional claim.

SUMMARY OF ARGUMENT

Appellants' argument that the alleged maximum deviation from the ideal district size in actual numbers (not percentages) of +2 to -7 individuals in several of Ohio's congressional districts prevented dismissal of Appellants' complaint (*see* Jur. St. at 23) suffers from several defects. First, viewed in light of the differences between the largest and smallest districts in cases such as *Karcher v. Daggett*, 462 U.S. 725 (1983) (3,674 persons), the district court correctly concluded that the maximum difference of nine persons alleged in the instant suit is indeed "minuscule" and constitutionally insignificant. The nine-person difference is so small as to be attributable entirely to computer or human error and thus is entirely consistent with the conclusion that the State here acted in good faith to attempt to reach precise mathematical equality.

Second, in the event that even such infinitesimal population discrepancies require justification under *Karcher*, *supra*, the allegations of Appellants' own complaint that the Ohio General Assembly drew congressional districts which protected almost all of the incumbents and which attempted to maintain the balance in the Ohio congressional delegation between Republicans and Democrats, provided sufficient justification for the tiny deviations from exact numerical equality at issue here. *See Karcher*, 462 U.S. at 741; *accord*, *White v. Weiser*, 412 U.S. 783, 797 (1973).

Third, Appellants do not seek the only remedy that would be available under *Karcher v. Daggett*, *supra*, for such a population variance -- a plan with precise mathematical equality. *See* Transcript of Oral Argument

before the District Court, at p. 30, Appendix to Appellees' Motion at A-3. For this reason also, the district court's judgment in this case should be summarily affirmed.

Appellant's second claim in this case, alleging an unconstitutional "bipartisan gerrymander" in the drawing of Ohio congressional district lines, is flawed as well. Appellants' requested remedy (for the court to order the Ohio General Assembly to devise a "fair process" devoid of any considerations such as protection of incumbents or maintaining a balance between political parties) ignores that "apportionment is a political process," *Karcher*, 462 U.S. at 739-40, and that Article I of the Constitution places the responsibility for drawing voting districts on the States in the first instance, *see Growe v. Emison*, 507 U.S. 25, 34 (1993).

This Court's decision in *Gaffney v. Cummings*, 412 U.S. 735 (1973), defeats Appellants' bipartisan gerrymandering claim. *Gaffney* held that a reapportionment plan that was designed to create safe seats for the major parties consistent with their existing relative voting strength in the state legislature, the desired effect being retention in office of as many incumbents as possible, was constitutional.

Appellants disavow reliance upon the plurality opinion in *Davis v. Bandemer*, 478 U.S. 109 (1986), to support their bipartisan gerrymandering claim, and that case does not support their claims in any event. Appellants cannot sufficiently allege either that the Ohio redistricting plan intentionally discriminated against an identifiable and cohesive political group, *see id.* at 127; *cf. Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979), or that the plan will consistently degrade a group of voters' influence on the political process as a whole (i.e., throughout the 1990's and after the redistricting after the 2000 census), *Bandemer*, 478 U.S. at 135-36.

Finally, Appellants' invocation of a generalized principle of "government neutrality"--based on an "amalgam of the Equal Protection Clause, the First, Fourteenth, and Fifteenth Amendments, and even the Magna Carta" (District Court Decision, Jur. St. at A-12)--to support their claims fares no better. Such a principle has not yet been recognized as a discrete constitutional right, and this Court should continue to exercise caution in doing so in this instance. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 121-22 (1991).

ARGUMENT

I. Ohio's Congressional Redistricting Plan Does Not Violate The "One Person, One Vote" Principle Of *Wesberry v. Sanders*, 376 U.S. 1 (1964).

A. Alleged Population Variations In Ohio's Congressional Districts Are Not A "Significant Variance Between Districts" Sufficient To Shift The Burden Of Proof To The State To Justify Any Alleged Discrepancy.

The issue presented by this appeal is straightforward: did the three-judge district court panel correctly conclude that the congressional redistricting of Ohio after the 1990 census was constitutionally sound? Appellants contend that Ohio's congressional districts violate Article I, §2 of the United States Constitution which provides in part that "The House of Representatives shall be composed of members chosen every second year by the people of several States...." That section also provides "Representatives ... shall be appointed among the several States ... according to their respective numbers...." In evaluating this question, the three-judge panel, citing *Karcher v. Daggett*, 462 U.S. 725 (1983),

recognized that there is a two part inquiry for evaluating the constitutionality of congressional districting:

> First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population. Parties challenging apportionment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld. If, however, the plaintiffs can establish that the population differences were not the result of a good-faith effort to achieve equality, the State must bear the burden of proving that each *significant* variance between districts was necessary to achieve some legitimate goal.

Karcher, 462 U.S. at 730-31 (emphasis added by district court panel), District Court Decision, Jur. St. at A-8.

The most important fact relevant to this case, as alleged in Appellants' complaint below, is that a few of Ohio's congressional districts have a maximum deviation in actual numbers (not percentages) of +2 or -7 individuals. The district court panel properly held that "this minuscule deviation does not represent the 'significant variance between districts' that *Karcher* requires before the burden shifts to the state to justify the discrepancy." District Court Decision, Jur. St. at A-8. The court continued: "Thus, we hold that when, across nineteen congressional districts, the variation in size between the largest and smallest districts is just nine persons, there is no viable claim of a violation of Article I, §2" of the United States Constitution. *Id.*

In reaching this conclusion, the panel compared these population discrepancies with the population variances found in other congressional district plans which had been the subject of Supreme Court challenges. For example, in *Karcher*, where this Court found that New Jersey's plan for congressional districts was unconstitutional, the difference between the largest and smallest district was 3,674 individuals. In *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court evaluated a challenge to Georgia's congressional redistricts after the 1960 census and found them to violate Article I, §2 of the United States Constitution. The difference in *Wesberry* between the largest and smallest district was 551,526. In *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), where the Court determined that Missouri's plan to redistrict was invalid, the figure was 25,802. Viewed in this light, the maximum difference of nine presented by the facts of the instant suit is indeed "minuscule" and constitutionally insignificant. Jur. St. at A-8. On the basis of such a small population variation, and on the basis of the express language of *Karcher* which requires "significant" variance between districts to be constitutionally actionable, the panel correctly determined that the burden to justify such discrepancy did not shift to the state. Jur. St. at A-8 to A-9.

The district court's holding in this case correctly recognizes that unlike the situations presented in *Karcher*, *Wesberry* and *Kirkpatrick*, such a minuscule deviation from exact population equality itself demonstrates the State's good faith effort to draw districts of equal population. This is so even if a court (or a plaintiff) "can conceive of minor improvements." *See Karcher*, 462 U.S. at 739, n.10. A difference of +2 or -7 is so small that to eliminate it may well require that a household be divided. *Cf.* Jur. St. at 7, n.15. Such a difference also is so small as to be attributable entirely to computer or human error. At all events, this is a far cry from a case in which an entire political subdivision

could be moved from one district to another to lessen the population differences. *Cf. Karcher*, 462 U.S. at 739.

Appellants' reliance on *Anne Arundel County Republican Central Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394 (D. Md. 1991), *aff'd mem.*, 504 U.S. 938 (1992), to support their claim is misplaced. Appellants assert that the district court in *Anne Arundel* reasoned that a variance of ten persons from the ideal district size must be justified by the State.[3] The holding of *Anne Arundel* that was necessary to the court's judgment is that the Maryland redistricting plan was constitutional because it was supported by legitimate goals within the ambit of *Karcher*--namely, among others, promoting the re-election of incumbents. *Anne Arundel*, 781 F. Supp. at 398.[4]

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[3]*Karcher* did not hold that the existence of an alternative redistricting plan with a smaller numerical deviation from absolute equality was an indication of lack of good faith. *But cf. Anne Arundel County Republican Central Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 396 (D. Md. 1991), *aff'd mem.*, 504 U.S. 938 (1992); *Stone v. Hechler*, 782 F. Supp. 1116, 1125 (N.D. W.Va. 1992). This Court in *Karcher* did not reach this question, given that entire political subdivisions between contiguous districts would have produced districts much closer to numerical equality. 462 U.S. at 739 ("[I]t was unnecessary for the District Court to rest its finding on the existence of alternative plans...").

[4]Additionally, this Court's summary affirmance of the judgment in *Anne Arundel* without a written opinion affords precedential effect to the judgment (*i.e.*, upholding the redistricting plan), but not necessarily the reasoning of the district court that was not essential to that judgment. *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977); *Edelman v. Jordan*, 415 U.S. 651, 671 (1974). For the same reason, the cases cited at note 83 of Appellants' Jurisdictional Statement--including cases which pre-

Ohio respectfully requests that the Court dismiss this appeal or affirm the lower court's decision on the basis of the district court panel's well-reasoned analysis with respect to the truly insignificant population variances in Ohio's congressional map.

B. Even If The Alleged Population Discrepancies Are Significant Enough To Shift The Burden To Ohio To Justify The Variations, The Allegations In Appellants' Complaint Provide Justifications Which This Court Has Recognized As Valid Reasons For Population Variations Among Districts.

In the event that this Court determines that even such infinitesimal population discrepancies require justification, Ohio submits that Appellants' complaint itself provides sufficient justification for them. This Court has determined that the standard for evaluating whether variations from strict equality are justified is a flexible one:

> The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely. By necessity, whether deviations are justified requires case-by-case attention to these factors.

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date *Karcher*--are not controlling (or apposite) here.

Karcher, 462 U.S. at 741. Thus, because the deviations at issue in the instant case are so small, any burden that the State might have to provide justification for them should be correspondingly light.

The interests which this Court has found to be legitimate state objectives which may justify population variances among districts include avoiding contests between incumbents. *Karcher*, 462 U.S. at 741; *accord*, *White v. Weiser*, 412 U S. 783, 797 (1973); *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966).[5] Additionally, maintaining balance between political parties is a legitimate goal which preserves the will of the people as expressed in prior elections under old district plans, again providing continuity of representation. *See Hastert v. State Board of Elections*, 777 F. Supp. 634, 659 (N.D. Ill. 1991) (plan approved would have "politically fair distribution of congressional seats across party lines"); *Cf. Gaffney v. Cummings*, 412 U.S. 735, 752 (1973) (state reapportionment). This Court has deferred to state legislative policies such as these even when those policies result in minor differences in the population of congressional districts, if the State's policy is otherwise consistent with constitutional mandates. *E.g.*, *White v. Weiser*, 412 U.S. at 795-797.

According to Appellants' complaint, when the Ohio General Assembly drew congressional districts following the 1990 census, it developed a redistricting plan which protected

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[5]The district court in *Anne Arundel* also held that legitimate state goals "within the ambit" of *Karcher* and which may justify the variations in a state's districting plan include the reelection of incumbents. 781 F.Supp. at 398; *accord*, *Arizonans For Fair Representation v. Symington*, 828 F. Supp. 684, 688 (D. Ariz. 1992), *aff'd sub nom. Hispanic Chamber of Commerce v. Arizonans For Fair Representation*, 507 U.S. 981 (1993).

almost all of the incumbents and which attempted to maintain the balance in the Ohio congressional delegation between Republicans and Democrats. *See, generally,* Complaint at ¶¶25, 26, and 31, Jur. St. at A-31 to A-35. Appellants' complaint, far from stating a cognizable claim, actually *provides* the justifications for the infinitesimal deviations among the districts.

Appellants argue that if the legislature had as its true goal the preservation of incumbents, it could have met that goal completely because there are exactly nineteen congressional seats and there were exactly nineteen incumbents. Appellants conclude that the legislature consciously decided to "sacrifice" two incumbents and that this demonstrates that it could not have had a genuine interest in the legitimate state goal of preserving incumbent seats. However, this also fails to state a cognizable claim.

The fact that the state's plan preserved some but not all incumbents neither detracts from nor invalidates the state's attempt to foster the legitimate goal of retaining incumbents under the new districting plan. As this Court recognized in *Karcher*, the degree of any justification that a state may be required to provide for a population deviation is roughly comparable to the degree of the deviation itself. *Karcher*, 462 U.S. at 741; *see, also, Anne Arundel*, 781 F. Supp. at 397. In this case, the maximum variation in Ohio's redistricting plan as alleged in the complaint is +2 or -7 -- or a deviation of 0.0016%. Given this tiny deviation, any justification that Ohio may be required to offer has been amply provided by the reasons alleged in Appellants' complaint. Without admitting or denying the truth of these allegations, and viewing them in the light most favorable to the Appellants, Ohio submits that Appellants' own complaint provides adequate and legitimate justification for the minuscule population deviations alleged in the complaint, and

that the district court's dismissal of this case therefore should be affirmed on this basis also.

C. Appellants Do Not Seek The Remedy Provided Under Existing Law For A Violation Of The "One Person, One Vote" Principle In Any Event, And For This Reason Also, The Dismissal Of Their Claims Should Be Affirmed.

While Appellants in their jurisdictional statement make about as much as can be made of the alleged +2 and -7 population variance in several of Ohio's nineteen Congressional districts, it is evident from their arguments, as in the court below, that they do not seek the only remedy that would be available under *Karcher v. Daggett*, *supra*, for such a variance. That Appellants are not seeking a plan with precise mathematical equality among districts is clear from their allegation that one of their favored plans will "meet Constitutional equality requirements by maintaining a variation in population less than plus or minus one percent from a perfectly equal population division," Appellants' Complaint at ¶27, Jur. St. at A-33--a standard that the current Ohio plan far exceeds. *See, also,* Transcript of Oral Argument Before District Court, at p. 30, Appendix to Appellees' Motion at A-3 (Appellants' counsel conceding that if someone drew a Congressional districting map by a process somehow entirely free of political considerations, and it turned out to be exactly the same as the current Ohio map, it would "absolutely" be acceptable to Appellants). *Cf. Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). Appellants' complaint, in short, seeks a remedy that is more "unconstitutional" (at least according to the nature of their claim) then the state action they are challenging.

The remedy that Appellants seek is a court order that the Ohio General Assembly devise a "fair process" -- one devoid of any political considerations -- and that the federal courts thereafter engage in a "fairness" review of the results of that process (*i.e.*, presumably the electoral results). Because this remedy is not available under existing law, *see Mahan v. Howell*, 410 U.S. 315, 322 (1975) ("population alone has been the sole criterial of constitutionality in Congressional redistricting under Art. I, Section 2"); *see, also, Badham v. March Fong Eu*, 694 F. Supp. 664, 674-75 (N.D. Cal. 1988), *aff'd mem.*, 488 U.S. 1024 (1989) (Art. I, § 2 does not include limitations on the political characteristics of the voters who are grouped together), *accord, Pope v. Blue*, 809 F. Supp. 392, 398 (W.D.N.C. 1992), *aff'd mem.*, 506 U.S. 801 (1992), and indeed runs counter to this Court's decisions which recognize that legislative redistricting is best left to the state legislatures unless federal judicial interference is unavoidable, this case should be summarily affirmed.

II. Appellants' "Bipartisan Gerrymandering" Claim Is Without Legal Basis And Was Properly Rejected By The District Court.

A. The Remedy Appellants Seek Disregards This Court's Precedents Which Recognize That The States Have Primary Responsibility For Redistricting.

Appellants' second claim in this case (*see* Jur. St. at 13) relates to the manner by which the congressional map was drawn in Ohio rather than the resulting population variations among the congressional districts. What Appellants seek is an order requiring Ohio to devise an "impartial procedure" to establish Congressional districts in Ohio, and, implicitly, for the federal court thereafter to

review the results of the procedure to decide if it was in fact "fair." *See, generally,* Jur. St. at 20-21; Complaint, A-58, A-59; Appellants' Memorandum Contra to Appellees' Motion to Dismiss, A-109.

As the district court correctly observed, Jur. St. at A-10 to A-11, Appellants simply fail to acknowledge that many of the cases on which they rely expressly recognize that state legislatures have the "primary responsibility" for reapportionment. *See, e.g., White v. Weiser*, 412 U.S. 783, 799 (1973) (Marshall, J., concurring); *see, also, id.*, at 794-95, citing *Reynolds v. Sims*, 377 U.S. 533, 586 (1964); *Voinovich v. Quilter*, 507 U.S. 147, 156 (1993) ("[I]t is the domain of the States, and not the federal courts, to conduct apportionment in the first place"); *see, also, Growe v. Emison*, 507 U.S. 25, 34 (1993) (citing U.S. Const., Art. I, §2) ("the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts"). This is in keeping with this Court's pronouncement that "apportionment is a political process" during which the legislature may take into account several legitimate interests, including preservation of incumbents, as long as it does so "consistent with constitutional norms." *Karcher*, 462 U.S. at 739, 740. The district court correctly declined to adopt Appellants' novel proposition that Art. I, §2 of the Constitution ordains a purely ministerial role for State legislatures in the redistricting process. Jur. St. at A-11.

Appellants' plea that the districting process should be turned over to any and all groups with "an interest" in the process, whether that be the Libertarian Party or the computer class at the local university, *cf.* Appellants' Memorandum Contra to Appellees' Motion to Dismiss, Jur. St. at A-101, is as unworkable as it is unsupported in the Constitution. *See, generally, Gaffney v. Cummings*, 412

U.S. 735, 753 (1973); *Pope v. Blue*, 809 F. Supp. at 398 (court rejected plaintiffs' contention that the Constitution requires that a computer program create redistricting plans that comport with non-partisan districting criteria). Because Appellants seek relief that is both unprecedented and unworkable and have not alleged a cognizable constitutional violation, the district court correctly dismissed Appellants' case.

B. *Gaffney v. Cummings*, 412 U.S. 735 (1973), Defeats Appellants' "Bipartisan Political Gerrymandering" Claim.

Appellants assert that Ohio's congressional districts are the result of a "*bipartisan* collusive gerrymander and [are] unique in American jurisprudential history because of that fact." Appellants' Memorandum Contra to Appellees' Motion to Dismiss (emphasis in original), Jur. St. at A-98. It is no mystery why a (successful) bipartisan gerrymandering claim would be "unique in American jurisprudential history" -- it is foreclosed by controlling precedents of this Court, principally, *Gaffney v. Cummings*, 412 U.S. 735 (1973).

Appellants strain to distinguish *Gaffney*, in which this Court expressly affirmed a legislative reapportionment plan that was designed to create safe seats for the major parties in the state legislature, the desired effect being the retention in office of as many incumbent legislators as possible. *Id.* at 752. Despite the acknowledged intentions of the drafters of the Connecticut plan at issue in *Gaffney*, this Court concluded that the plan was constitutional as a matter of law. Specifically, the Court found:

> [t]he record abounds with evidence, and it is frankly admitted by those who prepared the plan, that virtually every Senate and House

> district line was drawn with the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties, the only two parties in the State large enough to elect legislators from discernible geographic areas....
>
> We are quite unconvinced that the reapportionment plan offered by the [defendants] violated the Fourteenth Amendment because it attempted to reflect the relative strength of the parties in locating and defining election districts. It would be idle ... to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. Our cases indicate quite the contrary.

Id.

As this Court accurately observed in *Gaffney*, not only are "[p]olitics and political considerations ... inseparable from districting and apportionment, " *id.*. at 753, but "[d]istrict lines are rarely neutral phenomena." *Id.* Indeed, district lines "can well determine what district will be predominantly Democratic or ... Republican ... [o]r may pit incumbents against one another or make very difficult the election of the most experienced legislator." *Id.* The "reality," this Court opined, "is that districting inevitably has and is intended to have substantial political consequences." *Id.* Thus, courts should not interfere with "essentially political processes" that reflect a State's successful efforts to "allocate political power to the [major] parties in accordance with their voting strength." 412 U.S. at 754.

The similarities between the facts in *Gaffney* and the allegations in the complaint in this case are not only striking but clearly reinforce the District Court's decision to dismiss Appellants' political gerrymandering claim. Appellants' complaint alleges that the Ohio Democratic and Republican Parties, the only parties with sufficient voting strength to elect legislators, *cf. Gaffney*, 412 U.S. at 752, promulgated a redistricting plan designed to achieve relative proportionality between incumbents of both parties in the districting of Ohio's delegation to Congress.

The fact that this case involves congressional redistricting does not serve to distinguish *Gaffney*. This Court has observed in the congressional redistricting context that avoiding contests between incumbents is among the legitimate factors that a state legislature may take into account in redistricting. *See Karcher v. Daggett*, 462 U.S. at 740; *accord*, *White v. Weiser*, 412 U.S. at 797. *See, also, Bush v. Vera*, __ U.S. __, 116 S.Ct. 1941, 135 L.Ed.2d 248, 260-61 (1996) (citing *Gaffney* in reaffirming that incumbency protection is recognized as a legitimate state goal in congressional redistricting).

C. Appellants Eschew Reliance Upon *Davis v. Bandemer*, 478 U.S. 109 (1986), And That Case Lends No Support To Their Claims In Any Event.

Appellants expressly disavow reliance upon *Davis v. Bandemer*, 478 U.S. 109 (1986), in this case. *See* Jur. St. at 19, n.58 ("This case is not a *Bandemer* case ..."). This concession, in addition to the controlling precedent discussed elsewhere in this motion, forecloses Appellants' claims.

Appellants understandably admit that *Bandemer* does not support their claims. The plurality opinion[6] in *Davis v. Bandemer* announced the test for deciding whether an alleged partisan political gerrymander (*i.e.*, a gerrymander designed to benefit only one of the major parties) violates the Constitution. Parties asserting such a claim must allege and prove "both intentional discrimination against an *identifiable political group* and an actual discriminatory effect on that group." 478 U.S. at 127 (emphasis added). In the case at bar, Appellants' complaint fails to satisfy either prong of the test because it does not identify a political group that has been discriminated against, intentionally or otherwise, nor does it allege sufficient facts to support a finding of discriminatory effect.

1. The Complaint Fails To Allege Intentional Discrimination Against Identified Groups Of Which Appellants Are Members.

Appellants allege in their complaint that Ohio's plan discriminates against certain candidates from the two major parties, independent voters (unidentified except for Plaintiff Kukor), and members of the Libertarian Party. It should go without saying that a bipartisan gerrymander crafted by the Democratic and Republican Parties cannot be designed to discriminate against those parties. Indeed, the author of the *Bandemer* plurality opinion observed (at an earlier point in that decision) that "... nonpartisan gerrymanders in fact are aimed at guaranteeing rather than infringing fair group representation ...", 478 U.S. at 125, n.9 (opinion of White,

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[6]When the Supreme Court does not speak through a majority of its members, the plurality opinion providing the "narrowest grounds" for the decision is controlling. *Marks v. United States*, 430 U.S. 188, 193 (1977).

J.). Thus, Appellants Miller, Erney, Fitrakis, Hollister, Pansino, Woodall, and Grote (all either Republicans or Democrats) cannot allege the type of harm contemplated by the *Bandemer* plurality. *Cf.* 478 U.S. at 131 (noting that *Gaffney* upheld a similar "political fairness" approach).[7] Indeed, by virtue of their respective affiliations with opposing parties, Appellants Miller, Pansino, Woodall, and Grote on one hand, and Erney, Fitrakis, and Hollister, on the other, cannot seriously claim that they have a common political interest that unites them. That they have joined together to prosecute a single lawsuit does not satisfy the constitutional requirements of group status required by *Bandemer*.

Just as individual candidates from the major political parties cannot successfully challenge the constitutionality of a bipartisan districting plan, it should be equally obvious that independent voters (such as Appellant Kukor), are not an identifiable and cohesive group for purposes of vote dilution analysis. Indeed, it would be impossible to devise a districting plan that intentionally discriminated against "independent voters" as a group--voters who by definition are *not affiliated* with a particular political party.

Finally, the allegation that district lines were drawn out of compromise between the Democratic and Republican

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[7]While it is true as a general matter that individual candidates for either party, even incumbents such as Miller, may encounter difficult odds in a particular district under a particular districting plan, they cannot make out a claim for bias against them as an identifiable group, which is the essence of a vote dilution claim under the Constitution. *See Bandemer*, 478 U.S. at 127; *cf. Gaffney*, 412 U.S. at 753 ("Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislation.").

Parties is insufficient to establish that the lines were drawn to intentionally discriminate *against* the Libertarian Party (or indeed, against any of the other Appellants), a requirement of a political gerrymandering claim under *Bandemer*. 478 U.S. at 127. Intentional discrimination "implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker ... selected ... a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (citations omitted). Except in very conclusory terms, nothing in the complaint supports any of Appellants' claims that Ohio's districting plan was drawn with any specific purpose other than to achieve compromise between the major political parties.

2. Appellants' Complaint Fails To Allege The Requisite Discriminatory Effect Demanded By *Bandemer*.

Even if Appellants could somehow have alleged sufficient discriminatory intent (which they did not), the allegations of their complaint cannot establish "discriminatory effect" as defined by this Court. As the Court noted in *Bandemer*, unconstitutional discriminatory effect "occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or group of voters' influence on the political process as a whole." 478 U.S. at 132. There is no constitutional requirement in this context that "... any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat...." *Bandemer*, 478 U.S. at 136 (citing *Whitcomb v. Chavis*, 403 U.S. 124, 156 (1971)).

First, Appellants' reliance on the results of a single (1992) election to prove unconstitutional discrimination in the

context of political gerrymandering "is unsatisfactory" under *Bandemer*. *Id.* at 135-36 (in order to demonstrate unconstitutional partisan gerrymandering, Democrats in Indiana had to prove that the "1981 reapportionment would consign ... [them] to a minority status ... throughout the 1980's or that ... [they] would have no hope of doing any better in the reapportionment that would occur after the 1990 census"). The allegation that Appellant Miller lost in the 1992 Republican primary by a "razor-thin margin," complaint at ¶41, Jur. St. at A-37, falls far short of alleging that Miller would have no hope of political success throughout the 1990's or beyond. *Cf.* District Court Decision, Jur. St. at A-11. Appellants' complaint simply is devoid of factual allegations sufficient to satisfy this threshold requirement in *Bandemer*.

Second, the individual candidate Appellants and Appellant Kukor (an independent voter), because they do not comprise a group, cannot demonstrate any discriminatory impact on them as a group, let alone the degree of discriminatory effect required to make out a claim under the Equal Protection Clause of the Constitution. Additionally, state-wide district lines have limited impact on independent voters because the candidates for whom independents vote, at least from time to time, will experience electoral success.

Third, the complaint does not sufficiently allege any discriminatory effect on the Libertarian Party, which is not a state-recognized political party. Complaint at ¶6, Jur. St. at A-25. *Cf.* note 2, *supra*, and O.R.C. §3517.01(A). The Libertarian Party is not a "recognized political party" under Ohio law because it has not mustered even the modest statutory amount of support among the state's voters necessary for recognition. It follows that no matter how district lines are drawn, it is likely that the electability of Libertarian Party candidates will not be enhanced sufficiently

to change the effect, discriminatory or otherwise, that the current district lines may have on the Libertarian Party (even assuming the small number of Ohioans who comprise the Libertarian Party reside in proximity to each other, which the complaint does not allege).

Because Appellants disavowed any claim under *Bandemer*, and because their complaint failed to state such a claim in any event, the district court's judgment dismissing this case should be affirmed.

III. There Is No General Constitutional Principle Of "Governmental Neutrality" That Would Create The Right Urged By Appellants.

Appellants' principal argument in support of their claims is that Ohio's congressional districts violate some amorphous constitutional principle of "governmental neutrality" which they have constructed from an "amalgam of the Equal Protection Clause, the First, Fourteenth, and Fifteenth Amendments, and even the Magna Carta." District Court Decision, Jur. St. at A-12.[8] The district court's analysis of this contention is sufficient to put that claim to rest: "[w]hile we acknowledge that the 'concept of government as neutral referee' has been articulated in the context of specific constitutional claims, it has not yet been recognized as a discrete constitutional right." Jur. St. at A-

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[8]Appellants in this Court do not press their purported First Amendment claims asserted below, perhaps because courts to date have rejected such claims in this context. *See, e.g., Anne Arundel County Republican Central Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. at 401; *Pope v. Blue*, 809 F. Supp. at 398-99; *Badham v. March Fong Eu*, 694 F. Supp. at 675; *Holloway v. Hechler*, 817 F. Supp. 617, 629 (S.D. W.Va. 1992), *aff'd mem.*, 507 U.S. 956 (1993).

12. This Court has exercised restraint in the creation of new constitutional rights, *e.g.*, *Michael H. v. Gerald D.*, 491 U.S. 110, 121-22 (1991) (citing *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977)), and should continue to do so in this instance in which the right which Appellants ask this court to acknowledge is completely without foundation or precedent and totally without boundary or contour. While the government must be neutral in certain well-defined areas, beyond that, the government may, and does, promote certain policies while it disfavors others, as directed by the people who have elected its members. *See Gaffney*, 412 U.S. at 752-54; *Karcher*, 462 U.S. at 741; *White v. Weiser*, 412 U.S. at 797.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed or, in the alternative, the judgment below, dismissing Appellants' action with prejudice, should be affirmed.

Respectfully submitted,

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October 25, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

- - -

CLARENCE E. MILLER, ET AL. :

PLAINTIFFS, :

V. : CASE NO. C-2-94-1116

STATE OF OHIO, ET AL. :

DEFENDANTS. :

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TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE ALAN E. NORRIS, THE HONORABLE GEORGE C. SMITH, THE HONORABLE WALTER H. RICE, UNITED STATES DISTRICT COURT, SITTING AT COLUMBUS, OHIO, ON TUESDAY, AUGUST 29, 1995.

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APPEARANCES:

MR. DAVID V. STIVISON,
ON BEHALF OF THE PLAINTIFFS.

MS. DIANE R. RICHARDS AND MS. SUSAN E. ASHBROOK,
ON BEHALF OF THE GOVERNMENT DEFENDANTS.

- - -

Tuesday Afternoon Session,
August 29, 1995

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JUDGE NORRIS: This is case number C-2-94-1116. This is a three-Judge Court convened pursuant to 28 USC Section 2284(b)(1), and we are here this afternoon to hear arguments on the defendant's motion to dismiss filed pursuant to Civil Rule of Procedure 12(b)(6). At this point, I would ask counsel for the plaintiffs to -- for the plaintiffs to enter an appearance on the record.

MR. STIVISON: Thank you, Your Honor.

My name is David Stivison, S-T-I-V-I-S-O-N, appearing today on behalf of the plaintiffs, all of them in this action.

JUDGE NORRIS: Thank you. And for the defendant?

MS. RICHARDS: Your Honor, my name is Diane Richards, arguing today on behalf of the defendants in this case. Also seated with me at counsel table is Susan Ashbrook, an Assistant Attorney General.

JUDGE NORRIS: Thank you. With that then, those entries, anything further that we need to enter on the record?

We will call on Ms. Richards to begin her argument, and again, how much time for rebuttal?

* * *

JUDGE NORRIS: Let's assume the man from Mars lands, and the legislature says: Draw me 19 districts. And the man from Mars doesn't know anything about the background of politics and parties. He just draws the map, and it turns out to be exactly the map that we have before us. It is just pure coincidence. That's okay now, right?

MR. STIVISON: Absolutely.

JUDGE NORRIS: So, it is motive that counts?

MR. STIVISON: Well, people like Clarence Miller or Steven Grody or other of the plaintiffs here would know that whatever fight they face, they face because that's the way the cards fell. It was not a matter -- they weren't picked. Someone picked Congressman Miller for elimination. I think under Karcher v. Daggett, we have a right to put a witness on the stand and say: How did you do that? If this is the consistent application of an important State principle, tell us how that is. Explain to us how the application of the principles that you have identified lead to a variance of minus seven --

JUDGE NORRIS: Your argument on incumbents --

MR. STIVISON: On what?

JUDGE NORRIS: On incumbents, it intrigues me just a little bit. It is kind of like an ownership idea. You even allege a 1983 action on behalf of Congressman Miller, which to me -- is it a property concept? Congressmen own their districts, and you can't deprive them of them; is that it?

Why is Congressman Miller -- how does he have any kind of standing to complain that people drew the lines, if they followed other concepts? What possessory right does he have to the district? I don't get it.

MR. STIVISON: He doesn't have a possessory right to a district, and if these district lines were drawn -- I'm sorry.

JUDGE NORRIS: Don't you allege that?

MR. STIVISON: No, sir. No, sir. If these lines were drawn according to a consistently applied standard that reflects a valid State interest -- which is a question of fact that we have to prove at trial, we can't do it here. Then -- then, so be it.

JUDGE NORRIS: Right.

MR. STIVISON: We don't believe it is. The people who drew the lines made it very clear what they were doing.

JUDGE NORRIS: I mean, I understand your argument. As Judge Rice mentioned, voters, you know, have some interest in how these lines are drawn. But congressmen? I just -- but I know they like to talk about my district and your district, but now --

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CERTIFICATE

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I, Georgina L. Wells, Registered Professional Reporter, Official Court Reporter, Holder of Certificate of Merit do hereby certify that the foregoing 51 pages constitutes a true, correct and complete transcription of the oral argument in the above-entitled cause heard before The Honorable Alan E. Norris, The Honorable George C. Smith and The Honorable Walter H. Rice, United States District Court, sitting at Columbus, Ohio, on Tuesday Afternoon, August 29, 1995, and said proceedings having been written by me, electronically reproduced and transcribed by computerization and personally edited by me against my computerized stenographic notes.

_____

GEORGINA L. WELLS, RPR, CM
Official Court Reporter

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O.R.C. §3501.01 Definitions.

As used in the sections of the Revised Code relating to elections and political communications:

* * *

(F) "Political party" means any group of voters meeting the requirements set forth in section 3517.01 of the Revised Code for the information and existence of a political party.

* * *

O.R.C. §3517.01 Definitions.

(A) A political party within the meaning of Title XXXV [35] of the Revised Code is any group of voters that, at the most recent regular state election, polled for its candidate for governor in the state or nominees for presidential electors at least five per cent of the entire vote cast for that office or that filed with the secretary of state, subsequent to any election in which it received less than five per cent of that vote, a petition signed by qualified electors equal in number to at least one per cent of the total vote for governor or nominees for presidential electors at the most recent election, declaring their intention of organizing a political party, the name of which shall be stated in the declaration, and of participating in the succeeding primary election, held in even-numbered years, that occurs more than one hundred twenty days after the date of filing. No such group of electors shall assume a name or designation that is similar, in the opinion of the secretary of state, to that of an existing political party as to confuse or mislead the voters at an election. If any political party fails to cast five per cent of the total vote cast at an election for the office of governor or president, it shall cease to be a political party.

* * *